

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Reallocation and Service Rules for the)	GN Docket No. 01-74
698-746 MHz Spectrum Band (Television)	
Channels 52-59))	
To: The Commission		

**COMMENTS OF
THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.**

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I. INTRODUCTION AND SUMMARY.

The Association for Maximum Service Television, Inc. ("MSTV") urges the Commission not to take any action in this rulemaking that might reduce the flexibility needed by broadcasters and other potential service providers in order to deploy new services in the 698-746 MHz band. The time is not right to prepare for an auction or define service rules. To the extent that the Commission is required by statute to do so, it should act with two priorities in mind. First, it should maximize flexibility for a full range of future uses, including broadcasting, innovative broadband services, and wireless services. Second, it should provide full protection to incumbent broadcasters through the end of the DTV transition.

A third priority articulated by the Commission in its *Notice of Proposed Rulemaking*¹ – clearing the band to facilitate more rapid introduction of new services – is not a realistic or helpful objective for this band. Efforts to promote band clearing in this band will ultimately delay, rather than encourage, availability of an unencumbered band for new services.

¹ See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Notice of Proposed Rulemaking*, GN Docket No. 01-74, __ FCC Rcd __ (rel. March 28, 2001) (*Notice*).

Such efforts will hamper the DTV transition and cause an unjustified loss of analog and digital television service through both the loss of second television channels and new interference to those channels that remain. The preferable course – one suggested by Congressional mandate and national communications policy – is for the Commission to craft and then implement a comprehensive plan for making good on the objectives of the DTV transition. Relocation of Channel 52-59 incumbents should occur only as the result of an effective transition to DTV and recovery of the analog spectrum. It must not be the result of aggressive band clearing measures that diminish the public's television service and leave the core challenges of the DTV transition unaddressed.

II. THE COMMISSION SHOULD NOT ADOPT AN ALLOCATION OR SERVICE RULES THAT WOULD LIMIT FLEXIBILITY IN THE 698-746 MHz BAND.

A. Because of uncertainties about the market and the available technologies, and because of the high degree of incumbency, it is still too early to define service rules for this band.

MSTV urges the Commission to delay the definition of service rules for the 698-746 MHz band. Given the degree of incumbency noted by the Commission, it may be impossible or impractical to introduce any new service before the end of the DTV transition.² By that time – 2006 or beyond – the technological and market environment for such services may have changed significantly. Even today, questions about the nature of next generation technologies are making it difficult to define the optimal technical characteristics of a band adapted to new services. It is even more difficult to say what licensing and service rules will be optimal five years from now. It is hardly surprising, then, that many voices in the Administration, Congress and industry are warning that 2002 is too soon for this auction.

² *Id.* at ¶ 26 (noting that in comparison to upper 700 MHz band “it will be far more difficult for new services to operate on this band, particularly in major metropolitan markets,

Preparing for an auction at this stage is premature. Broadcasters and other potential users face a fluid technological and market environment. As Commissioner Ness has previously noted, “[e]quipment manufacturers, service providers, and the financial community all need time to draft business plans, design equipment, and secure funding well in advance of any application or auction date”³ – a lesson reemphasized by the recent multiple delays of the main upper 700 MHz auction.

Existing broadcast licensees would like to explore ways of using additional spectrum to provide enhanced digital multimedia services, or to experiment with new technologies including mobile applications, the provision of a back channel for interactive video programming, or datacasting services. However, notwithstanding that the other players necessary to the digital transition are stalled, the broadcast industry continues to devote most of its technological development resources to making DTV a success. Because broadcasters are already in the midst of adopting one new technology, it is still too early for the industry to advance a detailed agenda for enabling new broadband uses of the 698-746 MHz band or attempt to define the optimal licensing and service rules for such services.

Wireless providers, another potential user of this band, are beginning to face fundamental questions about the band’s suitability for their new technologies and their readiness to implement such technologies in the band. Some are questioning the appropriateness of 700 MHz in comparison to other possible bands.⁴ Meanwhile, market researchers predict a “bleak

prior to the end of the transition”).

³ See Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, *Policy Statement*, 14 FCC Rcd 19868, 19895 (1999) (*Policy Statement*) (separate statement of Commissioner Ness).

⁴ See Jeffrey Silva, *Jeb Bush weighs in against wireless in 3G spectrum fight*, RCR Wireless News, April 23, 2001 (“Industry prefers the 1700 MHz band because it would enable global roaming and provide the kind of economies of scale that lead to lower production costs for

short-term outlook for third-generation services” due to “[h]igh costs to buy spectrum, delays in handset introductions and slow consumer uptake.”⁵ In light of these circumstances, key members of Congress have expressed support for the Bush Administration’s proposal to delay by two years the auction of the 698-746 MHz band⁶ – a proposal reportedly driven in part by official concern that “the market isn’t ready technologically for wireless carriers to use the spectrum, since accessing the resource would require technology that is still in development.”⁷

Given the uncertainties faced by broadcasters and other potential users, the best alternative would be to refrain from placing any restrictions on future uses of the band until broadcasters and wireless providers can say with greater certainty what characteristics it must offer.

B. If the FCC finds it necessary to move forward in spite of this uncertainty, then it must preserve maximum possible flexibility for full-power broadcasting and other broadband uses of the band.

Even though it is premature to prepare for an auction at this stage, MSTV recognizes that the Commission is presently required by statute to auction the 698-746 MHz

suppliers.”); Jonathan Collins, *Air Control – The FCC Comes Under Fire For Its Management Of Potential 3G Wireless Spectrum*, tele.com, April 30, 2001 (“[A]side from the problems of vacating the 700-MHz spectrum, wireless operators will face additional difficulties deploying services in the spectrum, which is not used for cellular service in any other major international market.”).

⁵ See *Cahners In-Stat: Slow Start Awaits 3G*, Wireless Today, April 30, 2001 (citing report by market research firm Cahners In-Stat Group); See also *Pass the painkillers*, The Economist, May 5, 2001 at 61 (reporting that introduction of 3G service is “being plagued by fearsome technical and financial difficulties” and that it will be “several painful years, rather than months, before 3G becomes widely available”).

⁶ See *FCC budget would increase, then level, under Bush plan*, Communications Daily, April 10, 2001 (noting support of House Commerce Committee Chairman Tauzin (R-La.) for auction delay, as well as conditional support of Senate Minority Leader Daschle (D-S.D.) and House Minority Leader Gephardt (D-Mo.) if delay is “necessary to maximize its [auction’s] effectiveness and address telecommunications policy concerns”).

⁷ Mark Rockwell, *GOP Gridlock – Congress Bristles At Bush’s Attempted Spectrum*

band by September 2002. Unless that mandate is changed, the Commission will be forced to make an allocation and define service rules in order to fulfill the statutory obligation.

In the event that the current statutory mandate remains in place and the Commission is prematurely forced to adopt an allocation and service rules, it should permit a full range of broadcast and other broadband applications, as well as two-way mobile services. Preserving maximum flexibility is the only sound way to deal with the uncertainties surrounding future use of this band in a manner that is consistent with the Commission's overall spectrum policy.⁸ Maximum flexibility should be reflected in the allocation and carried over into the service rules, which MSTV agrees "should implement flexible use for the full range of proposed allocated services, consistent with necessary interference requirements."⁹

In considering service rules for this band, the Commission must not allow short term band clearing concerns to take the place of sound spectrum management. The Commission's proposal to establish service rules "that will facilitate ... the clearing of incumbent broadcasters from this spectrum" would do just that, allowing the land-rush mentality of the moment to dictate rules that could govern this important spectrum block for many years to come. If the Commission permits that to happen, it will find itself back in the position of making spectrum policy on an ad hoc, band-by-band basis – an approach it rejected less than two years ago.¹⁰ As explained below in Section IV, the problem of incumbency is best dealt with by

Proposals, tele.com, March 19, 2001.

⁸ See *FCC takes first step to auction lower 700 MHz channels in 2002*, Mobile Communications Report, April 2, 2001 (quoting comments of Commissioner Ness on release of *Notice* stating that Commission needs to "recognize we do not know at the end of this transition period what this band is going to be used for" and "be very careful to ensure we are not creating a hodgepodge that ends up being very inefficient").

⁹ *Notice* at ¶ 35.

¹⁰ See *Policy Statement* at 19894 (separate statement of Commissioner Ness).

ensuring a rapid DTV transition, not by attempting to rush clearance of a band that broadcasters need to continue using through the end of the transition, if they are to complete it in the manner that Congress intended.

1. The Commission should license the band in 6 MHz blocks and permit flexible aggregation up to the full 48 MHz.

The Notice discusses the possibility of licensing spectrum in this band in blocks of 48, 24, or 6 MHz, as well as seeking comment on other alternatives. MSTV supports the basic premise that any channelization of this band should remain compatible with the existing 6 MHz channels. This can best be achieved by dividing the band into blocks of 6 MHz (corresponding to the existing channelization), while permitting the aggregation of spectrum up to the full 48 MHz in case potential licensees wish to acquire larger blocks.

Six megahertz blocks are necessary to enable the adaptation of digital television technology for purposes of deploying new, innovative broadband services in this band. As MSTV has previously noted,¹¹ a 6 MHz block of spectrum would give potential broadband users sufficient bandwidth to provide a variety of innovative services, as well as access to the existing and widespread installed base of television receivers – both analog and digital. Access to digital receivers reduces the challenges associated with requiring customers to purchase additional equipment in order to receive new broadband services, and thus enhances the incentive to offer such services. MSTV's suggested approach provides optimal flexibility by preserving the possibility of aggregation, while also ensuring that if aggregation does not occur, each individual block of spectrum will still be broadband-ready.

¹¹ *Comments of the Association for Maximum Service Television, Inc.*, WT Docket No. 99-168, at 8 (July 19, 1999).

To maintain the integrity of the 6 MHz blocks needed for the future deployment of broadband services in this band, the Commission should not adopt guard bands or a separate allocation in the lower portion of the band. As MSTV pointed out repeatedly in the Upper 700 MHz proceeding, there is no technical justification for guard bands.¹² Broadcast users on adjacent bands can be protected by enforcement of out-of-band emission limits. With clear interference rules in place, there should be no need for guard bands to protect adjacent channel broadcasters on Channel 51.

2. A power limit of 50 kW would be appropriate for controlling interference within and at the edge of geographic service areas, but should not preclude power increases within service areas.

The Commission seeks comment on the viability of a 50 kW limit for full power broadcasting in this band. MSTV believes that a 50 kW limit for broadcast operations in the band would be viable as a benchmark assumption for purposes of limiting interference within and at the edge of service areas in an appropriate large geographic area licensing scheme. However, licensees should be permitted the flexibility to increase their power above 50 kW within service areas, provided that they do not cause co-channel or adjacent channel interference to other users of that band. This more flexible approach would be consistent with the maximization procedure used in the DTV context.¹³

¹² See *Comments of the Association for Maximum Service Television, Inc.*, WT Docket No. 99-168 (January 18, 2000); *Letter from Ellen P. Goodman to Magalie Roman Salas*, WT Docket No. 99-168 (Jan. 5, 2000); *Letter from Jonathan D. Blake and Ellen P. Goodman to Magalie Roman Salas*, WT Docket No. 99-168 (Dec. 29, 1999); *Letter from Jonathan D. Blake to Magalie Roman Salas*, WT Docket No. 99-168 (Dec. 27, 1999).

¹³ See *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders*, 14 FCC Rcd 1348 at ¶ 51 (1998).

MSTV supports the Commission's tentative conclusion that geographic area licensing of this band will afford licensees greater flexibility than site-by-site licensing.¹⁴

Assuming that the Commission adopts a geographic area approach, MSTV suggests that licenses must cover areas large enough to facilitate all potential services. At a minimum, that requires licensing on the basis of Major Economic Areas ("MEAs"), with appropriate modifications to ensure that no Designated Market Area ("DMA") is divided between two or more MEAs. Larger areas, such as the regional Economic Area Groupings used in the upper 700 MHz proceeding, could also be appropriate. The Commission should allow licensees the flexibility to partition larger license areas to serve the needs of different users and communities.

3. To facilitate flexible use, there should be as little variation as possible in the regulatory status of different users.

To encourage flexible use of the spectrum, the Commission should ensure that the construction rules and other regulatory treatment of the services provided in the 698-746 MHz band do not favor particular types of service. Instead, the Commission should adopt licensing rules that serve the public interest and encourage robust competition in both broadband and narrowband, fixed and mobile services. The regulatory treatment of the services provided in these bands should be as neutral as possible, and as independent as possible of the type of service the licensee chooses to provide. Consistency in regulatory treatment will promote flexible use by freeing a licensee to experiment with different services, depending on marketplace demands.

MSTV recognizes that it may be difficult to avoid some minimal variation in regulatory treatment between, for example, broadcast-type services and two-way wireless services. However, MSTV urges the Commission to consider this issue in light of the convergence of differing technologies and the close questions that may arise in years to come.

¹⁴ Notice at ¶ 53.

For example, very difficult definitional questions could arise if the Commission applies Part 73 to the extent that a service provider offers broadcast services and Part 27 to the extent that it offers other wireless services. Future service providers who offer hybrid mobile broadcast and two-way wireless services, for example, are likely to run into constant problems of regulatory status. With these situations in mind, the Commission should seek to define a flexible regulatory framework for this band that involves minimal restrictions and minimal variations across services.

III. THE COMMISSION MUST ADOPT INTERFERENCE CRITERIA THAT AFFORD FULL PROTECTION TO INCUMBENT BROADCASTERS.

The Commission should in no way compromise the level of interference protection afforded to the incumbent broadcasters authorized by Congress to remain in television Channels 52 through 59 through the end of the transition. The Commission correctly observes that licensees in the reallocated band must fully protect incumbent broadcast licensees from interference.¹⁵ Full protection requires, at a minimum, strict adherence to the standards for adjacent and co-channel interference for analog and digital stations established in the upper 700 MHz proceeding, and described in the *Notice*.¹⁶

Full protection also requires a careful assessment of the co-channel interference threat posed to DTV by digital, wide band emissions. As the Commission notes, it is impossible to know at this stage precisely what characteristics such services will display.¹⁷ This problem merits further investigation by the Commission, with the goal of developing a rule that will afford full protection to DTV service in the reallocated band.

¹⁵ *Notice* at ¶ 29.

¹⁶ *Id.* at ¶ 30-32.

¹⁷ *Id.* at ¶ 33.

IV. THE BAND CLEARING MEASURES PROPOSED BY THE COMMISSION ARE NOT APPROPRIATE FOR THE 698-746 MHz BAND.

MSTV urges the Commission to base its decisions in this proceeding on principles of sound spectrum management, rather than seeking a “quick and dirty” piecemeal band clearing solution. Applied to this band, the Commission’s band clearing proposals are not likely to produce significant useful results in the absence of a comprehensive plan for accelerating the DTV transition. But they are likely to undermine the DTV transition, thus delaying even further the ultimate availability of a clear band for new services.

At several points in the *Notice*, the Commission makes statements that suggest that its decisions about the future allocation of this band and the service rules under which it operates will be driven at least in part by the short term rush to get broadcasters out and make room for new services.¹⁸ Consistent with those statements, the Commission specifically proposes extending the band clearing policies adopted for the upper 700 MHz band to the much more crowded lower 700 MHz band.¹⁹

Unfortunately, there is no quick and easy band clearing solution for Channels 52-59 short of addressing the fundamental need to move along the DTV transition. Mandatory band clearing measures are not viable either as a matter of law or as a matter of spectrum policy. And the high degree of incumbency in these channels makes it overwhelmingly unlikely that any piecemeal voluntary strategy for moving broadcasters out will produce more than a few scattered pockets of usable spectrum for new services. Indeed, the press release accompanying the *Notice* estimated that there are *four times as many incumbents per channel* in Channels 52-59 as there were in Channels 60-69. The urgency of the demand for such scattered pockets of spectrum is

¹⁸ *Id.* at ¶¶ 37, 47, 52, 64, 125-36.

¹⁹ *Id.* at ¶ 130.

questionable, especially given that the nation's leading over-the-air broadband providers – *i.e.*, broadcasters – are presently preoccupied with the DTV transition, and wireless providers are reconsidering their basic assumptions about what spectrum and how much spectrum is needed to accomplish their near-term business objectives.

There is a perfectly logical reason why so many incumbents are present in Channels 52-59 and likely to remain there through the end of the transition. Congress originally envisioned a plan whereby the FCC would assign broadcasters additional channels and oversee a speedy dual-channel DTV transition, with the *end result* that more spectrum would become available for new uses. The incumbent broadcasters in Channels 52-59 are there because the Commission, implementing that plan, determined that they had to be there in order to fulfill Congressional objectives. That remains true today. The Commission cannot implement piecemeal band clearing strategies in Channels 52-59 without abandoning key elements of the basic transition plan, and doing so to a much greater extent than it already has done in regard to Channels 60-69.

Ironically, by gutting the transition plan, piecemeal band clearing efforts in Channels 52-59 will indefinitely delay availability of the one thing that future users of this band need most – a large block of clear, unencumbered spectrum. While piecemeal band clearing may create scattered pockets of usable spectrum in the short run, it will also squeeze broadcasters, eliminate second channels, and ultimately siphon off momentum from the DTV transition, allowing it to drag on well beyond 2006. This is a recipe for frustration not only for broadcasters who want to complete the transition, but also for future users of the reallocated band.

Future users of this band need an FCC strategy that will yield a clear and unencumbered band at the close of the transition much more than they need scattered pockets of

usable spectrum two or three years from now. Achieving a clear band requires nothing less than a renewed commitment on the part of the Commission to accelerating the DTV transition across all of the proceedings and industries that affect the future of television. A rapid transition is the only complete solution to the band clearing problem.

Instead of focusing on trying to move broadcasters out on a premature and piecemeal basis, MSTV urges the Commission to develop a comprehensive approach to moving the transition forward by taking steps on all of the fronts where further action is needed. Congress and the Commission have, together with the television industry, set an ambitious goal of replacing analog television technology with digital on an accelerated schedule. Commission action in at least two key areas – cable carriage and DTV receiver requirements – is needed to remove major obstacles blocking the transition. First, the Commission's decision denying digital must-carry rights during the transition has created a serious impediment. Broadcasters need some assurance that the 70% of their viewers who receive their service over cable will in fact have access to their digital signals. Consumers similarly need this assurance to stimulate their interest and investment in DTV.

Second, consumers will not embrace DTV unless adequately performing DTV reception equipment is available in the market. To date, the Commission has declined to impose performance thresholds for DTV sets, and receiver manufacturers have failed to adopt voluntary standards, despite overwhelming evidence that such thresholds are necessary to ensure consumers adequately functioning DTV sets and thus increase set penetration. Similarly, without a DTV tuner requirement, currently under consideration by the Commission,²⁰

²⁰ See Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, *Report and Order and Further Notice of Proposed Rule Making*, MM Docket No. 00-39 (re. January 19, 2001) ¶¶104-110.

consumers will continue to invest in millions of analog receivers each year, making the goal of having digital television in 85% of households more and more difficult to achieve.

As long as such fundamental barriers to the transition remain unaddressed, attempting to rush broadcasters out of Channels 52-59 will only further postpone the ultimate goal of providing an unencumbered band for new services. In order to maximize the ultimate value of the Channels 52-59 spectrum and preserve the public's free television service, the Commission must confront the challenges of the DTV transition and assure the orderly recovery of the analog spectrum as Congress intended. To do this, the Commission must exercise its authority to facilitate the cross-industry participation essential to a timely and successful transition.

If, in spite of these concerns, the Commission decides to adopt a band clearing strategy like the one that has been adopted (pending reconsideration) for Channels 60 to 69, it must at least draw the line on the extent to which broadcast viewers can be sacrificed in order to rush piecemeal clearance of scattered pockets of spectrum for new services. Already as a result of the 60-69 band clearing proposals, some viewers will lose existing television service. The adverse impact on the public interest from the loss of television service will only be multiplied if 52-59 broadcasters begin moving as well. To counteract that increased threat, the Commission should honor its commitment to "minimize the impact of the spectrum recovery process on broadcasters and viewers"²¹ by requiring that voluntary band clearing agreements cause no new interference, not even *de minimis* interference, to non-participating broadcasters.

²¹ Advanced Television Systems and their Impact upon the Existing Television Broadcast Service, MM Docket No. 87-268, *Sixth Further Notice of Proposed Rule Making*, 11 FCC Rcd 10968, 10980 ¶ 26 (1996).

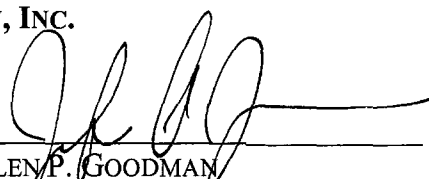
V. CONCLUSION.

For the reasons stated herein, MSTV urges the Commission to preserve the greatest possible flexibility for future users of the 698-746 MHz band, and to avoid adopting any rules at this stage that would restrict that flexibility or prejudice the ability of broadcasters and other potential users to offer innovative new services to the public in this band.

Respectfully Submitted,

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